

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JASON ALAN SMITH,

Plaintiff,

v.

SERGEANT GARRITY,

Defendants.

Case No. C19-6200 BHS

ORDER TO SHOW CAUSE

This matter has been referred to Magistrate Judge Theresa Fricke pursuant to 28 U.S.C. 636(b)(1) and Local Rule MJR 3 and 4. Plaintiff Jason Smith has filed an application to proceed *in forma pauperis* and a proposed complaint. Dkt. 1; Dkt. 1-1. Plaintiff previously filed two actions, which are currently pending in this Court, alleging apparently identical claims arising from the same incident but naming other defendants in addition to defendant Garrity. See *Smith v. Bremerton Police Dep't, et al.*, C19-5479-BHS; *Smith v. City of Bremerton*, C19-6199-BHS-DWC.

The Court finds that plaintiff has failed to state a viable claim in this proposed complaint; because plaintiff's claims in the instant action arise from identical subject matter as *Smith v. Bremerton Police Dep't, et al.*, C19-5479-BHS, plaintiff is directed to show cause **on or before May 22, 2020**, why this action should not be dismissed, without prejudice, as duplicative. The Court notes that plaintiff has been directed to amend his complaint in C19-5479, in which he is free to seek to include defendant

1 Garrity as a party. Plaintiff's application to proceed in forma pauperis shall be re-noted  
2 for May 22, 2020.

### 3 DISCUSSION

4 The court must dismiss the complaint of an individual seeking to proceed *in*  
5 *forma pauperis* "at any time if the court determines" that the action: (a) "is frivolous or  
6 malicious"; (b) "fails to state a claim on which relief may be granted" or (c) "seeks  
7 monetary relief against a defendant who is immune from such relief." 28 U.S.C. §  
8 1915(e)(2); 28 U.S.C. § 1915A(a), (b). A complaint is frivolous when it has no arguable  
9 basis in law or fact. *Franklin v. Murphy*, 745 F.3d 1221, 1228 (9th Cir. 1984).

#### 10 *Proposed Complaint*

11 Plaintiff bases his claims on an November 23, 2018, encounter in a Bremerton  
12 business parking lot with two police officers, Officer Ejde (who is not a named  
13 defendant) and defendant Sergeant Garrity. Dkt. 1-1, at 5-6. Plaintiff alleges violations  
14 of his First Amendment rights, claiming interference with the recording of police  
15 misconduct and retaliation for the exercise of plaintiff's free speech. Plaintiff also  
16 appears to include a state law claim for negligent supervision.

17 According to the complaint, plaintiff engaged in a "verbal exchange" with Officer  
18 Ejde, which became an "attack on [plaintiff]." *Id.* at 6, 7. Plaintiff's girlfriend "(Nyki)  
19 Jolene" was recording the encounter, presumably at plaintiff's request. *Id.* at 6.

20 Plaintiff alleges Sergeant Garrity talked to Ms. Jolene, speaking gibberish and  
21 waving his hand in front of Ms. Jolene's camera, which "interfered with" the recording of  
22 plaintiff's conversation. Dkt. 1-1, at 6. Plaintiff alleges that Sergeant Garrity is Officer  
23 Ejde's supervising officer. During the encounter, he expressed his opinion to Sergeant  
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1 Garrity that Officer Ejde was “on drugs,” based on plaintiff’s assessment of Officer’s  
2 Ejde’s behavior and pupils. Plaintiff alleges that Sergeant Garrity failed to “take  
3 immediate action to ensure Ejde was no longer a threat.”

4 Plaintiff alleges that when he called to lodge a complaint about the incident,  
5 Sergeant Garrity took his call and refused to take the complaint or permit plaintiff to  
6 speak with another officer. Dkt. 1-1, at 5. The complaint also appears to allege that in  
7 subsequent weeks, Sergeant Garrity was involved with the vandalizing of plaintiff’s car  
8 and the removal of its brake caliper bolt. Dkt. 1-1 at 6. The complaint alleges no facts to  
9 link Sergeant Garrity personally to those events.

10 Plaintiff’s complaint indicate that he has made multiple unsuccessful attempts to  
11 secure representation on these claims. Dkt. 1-2, at 2. Plaintiff seeks damages,  
12 “retraining” or “counseling” for defendant, and a public apology from defendant to him  
13 and his girlfriend. Dkt. 1-1, at 8.

#### 14 *Standard of Review*

15 The court must dismiss the complaint of an individual seeking to proceed *in*  
16 *forma pauperis* “at any time if the court determines” that the action: (a) “is frivolous or  
17 malicious”; (b) “fails to state a claim on which relief may be granted” or (c) “seeks  
18 monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §  
19 1915(e)(2); 28 U.S.C. § 1915A(a), (b). A complaint is frivolous when it has no arguable  
20 basis in law or fact. *Franklin v. Murphy*, 745 F.3d 1221, 1228 (9th Cir. 1984).

21 A complaint must contain sufficient factual allegations to state a claim and must  
22 not leave the Court to speculate about the underlying events. Fed. R. Civ. Pro. 8; *Bell*  
23 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). While the Court must construe a  
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1 pro se plaintiff's complaint liberally, this lenient standard does not excuse a pro se  
2 litigant from meeting the most basic pleading requirements. *Karim-Panahi v. Los*  
3 *Angeles Police Dep't*, 839 F.2d 621, 624 (1988); *American Ass'n of Naturopathic*  
4 *Physicians v. Hayhurst*, 227 F.3d 1104, 1107-08 (9th Cir. 2000).

#### 5 *First Amendment Claims*

6 To state a claim under § 1983, a complaint must allege: (1) the conduct  
7 complained of was committed by a person acting under color of state law, and (2) the  
8 conduct deprived a person of a right, privilege, or immunity secured by the Constitution  
9 or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). A plaintiff must  
10 allege facts showing how individually named defendants caused, or personally  
11 participated in causing, the harm alleged in the complaint. See *Arnold v. IBM*, 637 F.2d  
12 1350, 1355 (9th Cir. 1981).

13 Section 1983 claims may be brought against defendants in their official or  
14 personal capacities. *Hafer v. Melo*, 502 U.S. 21, 27 (1991). "[W]hen a plaintiff sues a  
15 defendant for damages, there is a presumption that he is seeking damages against the  
16 defendant in his personal capacity." *Mitchell v. Washington*, 818 F.3d 436, 442 (9th Cir.  
17 2016) (citing *Romano v. Bible*, 169 F.3d 1182, 1186 (9th Cir. 1999)). Here, the Court  
18 infers from plaintiff's request for damages that plaintiff wishes to impose individual  
19 liability on defendant Garrity acting in his personal capacity for actions taken under the  
20 color of state law. See Dkt. 1-1, at 7. Accordingly, the Court will examine whether  
21 plaintiff has alleged that defendant caused or personally participated in causing the  
22 harm alleged in the complaint. *Arnold*, 637 F.2d at 1355.

1           The Ninth Circuit has recognized a First Amendment “right to film matters of  
2 public interest,” although it has not explicitly recognized a right to record police officers  
3 in the course of their duties. *Fordyce v. City of Seattle*, 55 F.3d 236, 239 (9th Cir. 1995)  
4 (finding that in the absence of Washington state law on the permissibility of filming  
5 private conversations in public spaces, a videographer had raised a genuine dispute of  
6 material fact regarding the constitutionality of his arrest). Nonetheless, whatever the  
7 contours of plaintiff’s rights to make a record of his interactions with police officers, the  
8 complaint states that another person was trying to record the events on video and does  
9 not indicate that *plaintiff* was personally operating any recording equipment at all.

10           Furthermore, to bring a First Amendment retaliation claim, a plaintiff must  
11 establish that (1) plaintiff engaged in expressive conduct that addressed a matter of  
12 public concern, (2) the government officials took an adverse action against the plaintiff,  
13 and (3) the expressive conduct was a substantial or motivating factor for the adverse  
14 action. *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 923 (9th Cir. 2004). Without  
15 the factual allegation that plaintiff himself engaged in protected expressive conduct, the  
16 complaint fails to show how plaintiff’s own rights have been violated. Plaintiff’s complaint  
17 on its face suffers from a lack of standing to bring his First Amendment claims against  
18 Sergeant Garrity. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975).

19           Plaintiff’s complaint also fails to include facts connecting Sergeant Garrity to the  
20 other allegations of damage to plaintiff’s car or indicating any harm resulting from  
21 plaintiff’s phone conversation with Sergeant Garrity. The complaint lacks “sufficient  
22 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”  
23 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Co. v. Twombly*, 550  
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1 U.S. 544, 555 (2007)). Accordingly, plaintiff's proposed complaint fails to state a claim  
2 upon which relief can be granted.

3 Finally, this Court need not address plaintiff's state law claim for negligent  
4 supervision, as the Court lacks jurisdiction where plaintiff has failed to state a federal  
5 claim under § 1983.

6 *Duplicative Action*

7 Plaintiff, who is proceeding *pro se*, currently has two other matters pending  
8 before this Court in which he attempts to assert essentially identical claims against  
9 various defendants based on the 2018 encounter.

10 "Duplicative lawsuits filed by a plaintiff proceeding *in forma pauperis* are subject  
11 to dismissal as either frivolous or malicious under 28 U.S.C. § 1915(e)." *Goods v.*  
12 *Wasco State Prison*, No. 119CV01318JLTPC, 2019 WL 4670217, at \*1 (E.D. Cal. Sept.  
13 25, 2019); *see, e.g., Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995);  
14 *McWilliams v. State of Colo.*, 121 F.3d 573, 574 (10th Cir. 1997); *Pittman v. Moore*, 980  
15 F.2d 994, 994-95 (5th Cir. 1993); *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir.  
16 1988). An *in forma pauperis* complaint repeating pending or previously litigated claims  
17 may be considered abusive and dismissed under § 1915. *Goods*, 2019 WL 4670217, at  
18 \*1; *Cato*, 70 F.3d at 1105 n.2; *Bailey*, 846 F.2d at 1021.

19 "Repeating the same factual allegations asserted in an earlier case, even if now  
20 filed against new defendants, is subject to dismissal as duplicative." *Goods*, 2019 WL  
21 4670217, at \*1; *see, e.g., Bailey*, 846 F.2d at 1021; *Van Meter v. Morgan*, 518 F.2d 366,  
22 368 (8th Cir. 1975); *see also, Serlin v. Arthur Anderson & Co.*, 3 F.3d 221, 223 (7th Cir.  
23 1993) ("[A] suit is duplicative if the claims, parties, and available relief do not  
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1 significantly differ between the two actions.” (internal quotation marks and citation  
2 omitted)).

3 In one of these cases, *Smith v. Bremerton Police Dep’t, et al.*, C19-5479-BHS,  
4 plaintiff has already named Sergeant Garrity as a defendant. Plaintiff’s complaint in that  
5 action contains nearly identical, if more numerous, factual allegations, alleges the same  
6 constitutional violations, and seeks similar relief to plaintiff’s instant proposed complaint.  
7 The Court in that case fully analyzed plaintiff’s claims against defendant Garrity and  
8 dismissed the claims without prejudice for failure to state a claim. *Smith v. Bremerton*  
9 *Police Dep’t, et al.*, C19-5479-BHS, Dkt. 10, at 3 (W.D. Wash.). The Court granted leave  
10 for plaintiff to supply a second amended complaint in which plaintiff could supply  
11 additional facts to sustain a claim against defendant Garrity. *Id.* That deadline has  
12 currently passed, but the matter is still open. See *id.* at Dkt. 12.

13 In the second case, *Smith v. City of Bremerton*, C19-6199-BHS-DWC, Judge  
14 Christel has also recommended that the complaint be dismissed as duplicative and  
15 failing to state a claim. See C19-6199-BHS-DWC, Dkt. 7, at 5 (W.D. Wash.). That  
16 recommendation is currently under consideration. *Id.*

17 Plaintiff’s proposed complaint does not allege facts substantially different from his  
18 other complaints and appears to be duplicative. Therefore, the Court directs plaintiff to  
19 show cause why this complaint should not be dismissed without prejudice and without  
20 further leave to amend. See *Fid. Fin. Corp. v. Fed. Home Loan Bank of San Francisco*,  
21 792 F.2d 1432, 1438 (9th Cir.1986) (“The district court’s discretion to deny leave to  
22 amend is particularly broad where the court has already given the plaintiff an  
23 opportunity to amend his complaint.”).

CONCLUSION

Accordingly, it is **ORDERED** that plaintiff shall provide the Court **on or before May 22, 2020**, with an explanation of reasons why the Court should not dismiss this action.

The Clerk is directed to send a copy of this Order to plaintiff.

Dated this 20th day of April, 2020.

A handwritten signature in black ink, reading "Theresa L. Fricke". The signature is written in a cursive style with a horizontal line underneath.

Theresa L. Fricke  
United States Magistrate Judge